Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

THE ESTATE OF
LARRY JEROME JENKINS,

Petitioner,

v.

JON BARTLETT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Since *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 504 U.S. 579 (1999) and its progeny *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), there exists a spectrum of standards developed by the various courts of appeal defining an abuse of discretion with respect to discovery sanctions under Federal Rules of Civil Procedure 26(a)-(2)(B) and for the admissibility of evidence pursuant to Federal Rules of Evidence 702. Is the abdication, by performing no gatekeeping functions by the trial court, a *per se* abuse of discretion?

Page

TABLE OF CONTENTS

Question Presented i

Petition For Writ Of Certiorari 1

Opinion Below 1

Jurisdiction 1

Statutory and Federal Law Provisions 1

Statement Of The Case 3

Introduction 3

Background 4

Police Officer Bartlett's Version Of The Incident 5

The Estate Of Larry Jerome Jenkins' Version Of The Incident 6

The Shooting 6

The Dispute 7

Reasons For Granting The Writ 8

I. Certiorari Should Be Granted Because Of The Array Of Analysis For An Abuse Of Discretion By The Various Circuit Courts And That The Seventh Circuit Entered A Decision In Conflict With Decisions Of Other Courts Of Appeal In Not Finding An Abuse Of Discretion By The District Court In Allowing The Use Of Expert Testimony Despite Failure To Comply With The Requirement In F.R.C.P. 26(a)(2)(B) For Preparation And Submission Of Experts' Reports 8

Analysis 8

Page

The Gatekeeping Function Is An Affirmative Obligation Upon The Court. 9

II. Certiorari Should Be Granted Because The Seventh Circuit Entered A Decision In Conflict With Decisions Of Other Courts Of Appeal In Not Finding That The District Court Had Failed To Exercise Any Gatekeeping Function Under *Daubert* By Allowing The Use Of Expert Testimony Which Did Not In Any Way Comply With *Daubert* Or Its Progeny *General Electric Company* And *Kumho Tire* 15

Conclusion 21

TABLE OF CONTENTS
OF APPENDIX

APPENDIX A – Order Denying Rehearing Of United States Court of Appeals for the Seventh Circuit, dated June 19, 2007 . . . . . .1a

APPENDIX B – Opinion of United States Court of Appeals for the Seventh Circuit, dated April 23, 2007. . . . . .3a

APPENDIX C – Order of United States District Court, Eastern District of Wisconsin, dated January 15, 2004 . . . . . .25a

APPENDIX D – Order of United States District Court, for the Eastern District of Wisconsin, dated April 10, 2006. . . . . .35a

APPENDIX E – October 1, 2003 letter from Attorney Susan Lappen to Attorney Willie J. Nunnery re: Expert Witnesses 41a

APPENDIX F – Affidavit of Dr. Mary K. Mainland dated November 24, 2003. . . . . .44a

Page

APPENDIX G – Affidavit of Dr. Jeffrey M. Jentzen, dated November 24, 2003 ..... 46a

APPENDIX H – Affidavit of Mary K. Mainland, dated March 8, 2004 ..... 48a

TABLE OF AUTHORITIES

Cases:

Ammons v. Aramark Uniform Services, Inc., 368 F.3d 809, 816 (7th Cir. 2004) 15, 16

Brainard v. American Skandia Life Assur. Corp., 432 F.3d 655 (6th Cir. 2005) 14

Brooks v. Outboard Marine Corp., 234 F.3d 89 (2d Cir. 2000) 20

Campbell v. Keystone Aerial Surveys, Inc., 138 F.3d 996 (5th Cir. 1998) 5

Carr v. Deeds, 453 F.3d 593 (4th Cir. 2006) 5

Christiansen v. City of Tulsa, 332 F.3d 1270 (10th Cir. 2003) 19

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1983) 3, 8, 21, 22

Dodge v. Cotter Corp., 328 F.3d 1212 (10th Cir. 2003) 18

Eckelkamp v. Beste, 315 F.3d 863 (8th Cir. 2002) 13

General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512 (1997) 8, 21, 22

Glastetter v. Novartis Pharmaceuticals Corp., 252 F.3d 986 (8th Cir. 2001) 17

Cases, continued: Page

Gomez v. Rivera Rodriguez, 344 F.3d 103 (1st Cir. 2003) 11

Hamburger v. State Farm Mut. Auto. Ins. Co., 361 F.3d 875 (5th Cir. 2004) 14

Jenkins v. Bartlett, 487 F.3d 482, 487-88 (7th Cir. 2007) 1, 9, 15, 17

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149 .....3, 8, 21, 22

McClain v. Metabolife Intern., Inc., 401 F.3d 1233 (11th Cir. 2005).....18

Saudi v. Northrop Grumman Corp., 427 F.3d 271, 278-79 (4th Cir. 2005) 12

Pena-Crespo v. Puerto Rico, 408 F.3d 10 (1st Cir. 2005) 14

Prieto v. Malgor, 361 F.3d 1313 (11th Cir. 2004) 12, 13

Constitutional Provisions:

U.S. Constitution, Fourth Amendment..... 21

Statutes:

28 U.S.C. §1254(1) 1

42 U.S.C. §1983..... 4

Rules:

Federal Rules of Civil Procedure 26(a)(2)(B) 1, 8, 9

Federal Rules of Evidence 104 2

Federal Rules of Evidence 702 ..... 3, 9, 21, 22

PETITION FOR WRIT OF CERTIORARI

The Estate of Larry Jerome Jenkins by Debra Jenkins, the mother and as Special Administrator ("Petitioner"), respectfully petitions for writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is contained in the Appendix ("App.") beginning at App. 3a and was filed on May 22, 2006. The Seventh Circuit Court of Appeal's decision is cited in *Jenkins v. Bartlett*, 487 F.3d 482 (7th Cir. 2007).

JURISDICTION

The Seventh Circuit Court of Appeals denied Panel Rehearing on June 19, 2007 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY AND FEDERAL LAW PROVISIONS

Federal Rules of Civil Procedure ("F.R.C.P.") 26(a)(2)(B)

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as

an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the date or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Federal Rules of Evidence 104(a)

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally.* – Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination is it not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* – When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Federal Rules of Evidence 702

702. Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

INTRODUCTION

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1983) imposed a special obligation upon trial judges to "ensure that any and all scientific testimony is not only relevant, but reliable. This Court in *Daubert* and its reaffirmation in *Kumbo*, 526 at 149, mandated that the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline," *Kumbo Tire Co. v. Carmichael*, 526 U.S. 137, 149 (citing *Daubert*, 509 U.S. at 592).

There is nothing in the case record whereby the trial judge or the Court of Appeals did any pertinent inquiry as a precondition to admissibility of the testimony of the Forensic Pathologist, Doctors Jeffrey Jentzen and Mary Mainland. The Seventh Circuit describes what the plaintiff did but the opinion is completely silent on any independent analysis of the trial judge's application of *Daubert*. (App. 3a).

BACKGROUND

Petitioner sued the defendants pursuant to 42 U.S.C. §1983, alleging that Jon Bartlett, a police officer for the Milwaukee Police Department ("MPD"), used excessive force during the course of an arrest which resulted in the death of her son, Larry Jerome Jenkins ("Decedent").[1]

On September 19, 2002, defendant Bartlett and Police Officer Kurt Lacina stopped a black Jeep after they observed that the Jeep had been double parked, rolled through a stop sign, and that the Jeep's registration tags had expired. The officers also suspected drug-related activity was occurring because the occupants of the Jeep would not make eye contact with the officers, someone in the vehicle was using a cell phone, an individual was moving back and forth between the Jeep and a nearby residence. Officer Lacina was involved in a drug-related investigation on that block just prior to September 19, 2002, and the area was known for having a high rate of drug-related criminal activity. Lacina spoke to the driver of the Jeep, Tomas Prunskas, and Bartlett spoke to the passenger of the vehicle, the Decedent. The Decedent exited the vehicle and Bartlett patted him down for officer safety. The Decedent paused before giving the officer both his name and year of birth and he could not provide the officer with his address. Bartlett determined that he would have the Decedent sit in the squad car until the investigation was complete, but upon touching the Decedent's arm, the Decedent ran through yards and jumped over fences. Eventually, both the Decedent and Bartlett emerged onto the same

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[1] The factual background is found in the summary judgment decision R. 99, pp. 2-4.

street. R. 99, p. 2. The versions of subsequent events vary greatly.

POLICE OFFICER BARTLETT'S VERSION OF THE INCIDENT

According to Bartlett, the Decedent came upon a white Lincoln Towncar and yanked the passenger out of the vehicle. The Decedent entered the vehicle and had some contact with the driver. It appeared to Bartlett that the Decedent was attempting to "carjack" the vehicle. Bartlett intended to assist the driver by approaching the driver's side of the vehicle. Bartlett drew his service weapon because he feared for his safety and the safety of the occupants of the vehicle. When Bartlett was 10-15 feet directly in front of the vehicle, he observed that the Decedent had positioned himself in the driver's seat. Bartlett approached the vehicle and demanded that the Decedent stop his actions. Bartlett observed the vehicle accelerate toward him. Bartlett attempted to get out of the way of the oncoming car by moving to his rear and to the right, but the vehicle swerved in the officer's direction. The vehicle came into contact with Bartlett's legs, and Bartlett determined that his life was in danger and that it was necessary to use deadly force to protect his life. Bartlett fired his weapon at the Decedent. The Towncar crashed into another vehicle, and Bartlett was thrown off of the hood of the Towncar. The Decedent died as a result of being shot by Bartlett. R. 99, p. 3.

THE ESTATE OF LARRY JEROME JENKINS' VERSION OF THE INCIDENT

According to the plaintiff, the Decedent did not yank the passenger out of the Towncar and did not come into physical contact with the driver. The occupants of the vehicle were the Decedent's relatives and/or acquaintances. Bartlett told an investigating officer that he was going around the front of the vehicle to prevent the Decedent from stealing the vehicle, not to assist the driver of the Towncar. The car was never set in park, and the car did not accelerate at all or was moving rather slowly toward Bartlett. Bartlett jumped on the hood of the car and only then did Bartlett command Decedent to stop. The Decedent's hands were never on the steering wheel of the car, and his hands were up in a submissive position as if he was surrendering. The decedent never had control of the car, and the car was slowly rolling because there was no one located behind the steering wheel to stop it. The car only swerved after Bartlett started shooting. R. 99, p. 4.

THE SHOOTING

When the decedent approached the car, Ms. Benita Hughlett, the driver, described being at a corner whereby Mr. Jenkins approached the car on the passenger side. Another passenger in the front seat physically opened the front door and Mr. Jenkins got in. (PPFOF ¶¶250-252, R. 86 & 164). Mr. Hughlett was under the steering wheel. (PPFOF ¶257). The car was in drive at all times. Ms. Hughlett never took the car out of drive. Ms. Hughlett's feet were very slightly on the brakes to stop the car as to give Mr. Jenkins time to get in to the car. (PPFOF ¶¶256-259). While the officer was in front of

the car, the passenger opened the door and jumped out of the car. (PPFOF ¶¶256-267).

Ms. Hughlett identified the decedent in the car as tilting his head toward the left and downward. She observed the decedent as being "behind the dashboard and he like kind of hands up, no, I surrender, stop. Like before you know it, stop the car, stop the car. Pow, pow, powe." (PPFOF ¶278). Ms. Hughlett characterized his hand as saying, ok I give up. (PPFOF ¶279). It is this evidence which is in dispute in this case. Moreover, Ms. Hughlett further testified that the car was slowly rolling and nobody was behind the wheel to stop the car. (PPFOF ¶274). Ms. Hughlett additionally testified that there was never a time that Mr. Jenkin's hands were on the steering wheel. (R. 164).

THE DISPUTE

Officer Bartlett contended that the decedent had positioned himself directly in the driver's seat and that the decedent was attempting to hit him with the car. The appellant contended that the decedent was never behind the steering wheel of the car. (R. 99, pp. 3-4).

To bolster Officer Bartlett's version of the incident, Bartlett sought to offer the opinions of Forensic Pathologists Dr. Mary Mainland and Dr. Jeffery Jentzen. (App. E, F, G, pp. 41a-46a), based upon a letter report written by the lawyer for the police officer Bartlett. (App. E, p. 41a).

At trial (App. 37a-38a), the successor judge, Judge Herndon, reaffirmed Judge Stadtmueller's ruling (App. 32a-34a), allowing the expert testimony admitted.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE ARRAY OF ANALYSIS FOR AN ABUSE OF DISCRETION BY THE VARIOUS CIRCUIT COURTS AND THAT THE SEVENTH CIRCUIT ENTERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL IN NOT FINDING AN ABUSE OF DISCRETION BY THE DISTRICT COURT IN ALLOWING THE USE OF EXPERT TESTIMONY DESPITE FAILURE TO COMPLY WITH THE REQUIREMENT IN F.R.C.P. 26(a)(2)(B) FOR PREPARATION AND SUBMISSION OF EXPERTS' REPORTS.

With regard to the requirments for expert testimony in Federal Rules of Civil Procedure 26, and the substantive requirments for expert testimony from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), the federal appellate courts are in general agreement that they are to review the decisions of trial courts for an abuse of discretion. But underneath this nominal agreement on the appropriate scope of review is a marked conflict between the approach taken on these issues by the Seventh Circuit in this case and rulings by a number of other Federal Circuits. Specifically, other Circuits have applied more rigorous and demanding scrutiny to parties seeking to qualify and use expert testimony than was applied to the Defendants in this case. The Court should take this occasion to resolve that conflict.

ANALYSIS

Dr. Mainland and Dr. Jentzen opined that Mr. Jenkins was in an upright and seated position, behind the steering wheel, with his right arm raised in an upward and

extended position, at the time of the shooting. Curing the defects, Dr. Mainland and Dr. Jentzen affirmed the opinion letter of attorney Lappen in their affidavits dated November 24, 2003. (App. 44a, 46a). It is noteworthy that nowhere in the affidavits did Dr. Mainland or Dr. Jentzen as of November 24, 2003 opine that their opinions were to a reasonable degree of medical and forensic pathological certainty. The opinion stated nothing about decedent Jenkins "holding onto the steering wheel". Yet, they were allowed to testify at trial.

THE GATEKEEPING FUNCTION IS AN AFFIRMATIVE OBLIGATION UPON THE COURT

Petitioner herein asserts that notwithstanding objections pursuant to Federal Rule of Evidence 702, this was also objectionable pursuant to Federal Rule of Evidence 403. The Court in its opinion has basically concluded that Ms. Jenkins, the mother of the decedent, should have been the gatekeeper of this evidence and not the Court. The Court below beginning with Judge Stadtmueller in ruling against precluding the expert testimony of Dr. Mainland and Dr. Jentzen suggested that because the plaintiff does not articulate how the October 1, 2003 letter fails to comply with Rule 26(a)(2)(B) and because the plaintiff did not offer any authority, that the testimony should not be excluded, the court denied the motion to exclude the testimony. There was no mention of a *Daubert* analysis whatsoever regarding the affidavits of Dr. Mainland and Dr. Jentzen or their opinions. (App. C, pp. 32a-34a). There was never a *Daubert* type hearing in this case.

In this case the Seventh Circuit upheld the district court's decision to allow Drs. Jentzen and Mainland to

testify as experts for the Defendants despite noncompliance with the requirement in Rule 26 of the Federal Rules of Civil Procedure that an expert report *be prepared and provided to opposing parties. Jenkins v. Bartlett*, 487 F.3d 482, 487-88 (7th Cir. 2007). No such report from Drs. Jentzen and Mainland was ever forthcoming. The district court accepted as a substitute for such reports a letter (App. E, p. 41a), prepared by counsel for the Defendants summarizing the expected testimony by Drs. Jentzen and Mainland. The physicians subsequently submitted affidavits adopting the contents of the letter. The affidavits offered only the meager explanation that Drs. Mainland and Jentzen were busy and that, to save them the time involved in preparing the required report on the "reconstruction" they had conducted, they had authorized an attorney for the Defendants to summarize their anticipated expert testimony. In an especially elastic reacing of the requirements of Rule 26, and one that is at odds with precedents from other Circuits, the Seventh Circuit agreed with the court below that there had been substantial compliance with the expert report requirement in Rule 26.

In this case the Seventh Circuit stated that it reviews a district court's discovery rulings on the exclusion of expert testimony for an abuse of discretion. *Id.* at 488. More specifically, the court stated that it will not find an abuse of discretion unless: (1) the record contains no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary. *Id.* As will be discussed below, other Circuits have been much more demanding of proponents of expert testimony than was the Seventh Circuit in the particular circumstances of this case, but

even the articulation of the abuse of discretion standard set out in this case and in other Seventh Circuit precedents puts the Seventh Circuit in conflict with other Circuits.

For example, while the First Circuit has stated generally that it will review a district court order on sanctions for noncompliance with requirements for disclosure of expert testimony for an abuse of discretion, the district court abuses its discretion if it ignores a material factor deserving significant weight, relies upon an improper factor, or assesses only a proper mix of factors but makes a serious mistake in evaluating them; moreover, mistakes of law always constitute abuses of court's discretion. *Gomez v. Rivera Rodriguez*, 344 F.3d 103 (1st Cir. 2003).

Similarly, the Fifth Circuit's review of a decision on whether to allow the testimony of an expert when there is a failure to comply with a rule is under an abuse of discretion standard, but in its application the standard of review is more demanding of the proponent of the expert than was the Seventh Circuit in the instant case. See *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996 (5th Cir. 1998) (Allowing late-designated expert witness to testify in wrongful death and survival action was abuse of discretion when defendant failed to proffer any explanation for failure to designate expert in timely manner, potential prejudice to plaintiffs was plain and substantial, and district court failed to consider whether potential prejudice could be cured by continuance).

In *Carr v. Deeds*, 453 F.3d 593 (4th Cir. 2006), the Fourth Circuit found that a district court did not abuse its discretion in excluding plaintiff's expert witness due to the plaintiff's failure to comply with the expert disclosure rule in an action alleging that state troopers

unconstitutionally employed deadly force during an attempted arrest. The failure to provide disclosure was not inadvertent, and even if the defendants also failed to comply with the expert disclosure rule that did not justify the plaintiff's failure. The expert report attached to the complaint in Carr did not provide information about the expert's qualifications, publications, compensation, or other cases he had testified in as an expert, and the plaintiff's failure to disclose prejudiced the defendants in their ability to defend against the expert's accusations in a timely fashion. *Id.* at 604. In stark contrast to the casual treatment of the expert report requirement by the Seventh Circuit in the instant case, the Fourth Circuit in *Carr* underscored the "critical importance" of the information in the expert report, especially in cases which turn upon expert testimony. *Id.* Citing and quoting its earlier precedent in *Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 278-79 (4th Cir. 2005), the court in *Carr* stated further that Rule 26 disclosures are often the "centerpiece" of discovery in litigation that uses expert witnesses, and that a party that fails to provide these disclosures unfairly inhibits its opponent's ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court's management of the case.

The importance of enforcing the requirements in Rule 26 for expert testimony in this case is further shown by another excessive force case, from the Eleventh Circuit. In *Prieto v. Malgor*, 361 F.3d 1313 (11th Cir. 2004), an arrestee's excessive force action against county and police officers, the county was obliged to provide an expert witness report, pursuant to Rule 26, with respect to the testimony of a witness who was proffered as an expert in the use of force and police procedures, even though the witness was an employee. The

witness had no connection to the specific events underlying the case apart from his preparation for the trial, and he functioned exactly as an expert witness normally does, providing a technical evaluation of evidence he had reviewed in preparation for trial. (In *Prieto*, the objection to the expert testimony based on the absence of an expert report was waived by opposing counsel at trial, but there has been no such waiver of the point here.) The Ninth Circuit, in *U.S. v. Asiru*, 2007 WL 625251 (9th Cir. 2007), ruled that the district court did not abuse its discretion in refusing to admit the testimony of a certified public accountant (CPA) to confirm the taxpayers' allegation that the government's tax assessments were too high. Among the reasons for this exclusion was the fact that the taxpayers' attorney had failed to comply with the federal rules establishing notice requirements for the use of expert testimony and requiring a report regarding the expert's testimony. In particular, the Ninth Circuit rejected the argument that other documents, in that case tax forms, could be regarded as an acceptable substitute for the expert report, as they lacked all of the specific components set out in Rule 26(a)(2)(B). *Id.* at 3.

In *Eckelkamp v. Beste*, 315 F.3d 863 (8th Cir. 2002), the Eighth Circuit approved of a district court's denial of the plaintiffs' motion for leave to file a rebuttal expert report, or to substitute a declaration of their counsel as an alternate source of factual support in opposition to summary judgment. The district court found that the motion to substitute counsel's declaration was nothing more than an attempt to make an end run around the court's decision on the rebuttal report, insofar as it included material very similar to summary exhibits and supporting documentation in the report. *Id.* at 872.

Similarly, in the view of the First Circuit, documents submitted by an employee in a Title VII hostile work environment action against an employer consisting of a treating psychiatrist's evaluation and resume, and an employee's medical records, did not qualify as an expert witness report, and thus the district court was entitled to exclude the psychiatrist from testifying. *Pena-Crespo v. Puerto Rico*, 408 F.3d 10 (1st Cir. 2005). The "substitute" documents did not explain the basis for the psychiatrist's opinions, describe any exhibits the psychiatrist planned on using, list the psychiatrist's publications or other cases in which he testified, or set forth the psychiatrist's expected compensation for his testimony. The First Circuit emphasized that, in the arena of expert discovery, Rule 26 increases the quality of trials by better preparing attorneys for cross-examination, and the failure to provide an expert report that satisfies the specific requirements of Rule 26(a)(2)(B) undermines opposing counsel's ability to prepare for trial. *Id.* at 13.

To similar effect are decisions from other Federal Circuits which, contrary to the lax approach to the Rule 26 requirements for expert testimony adopted by the Seventh Circuit in this case, show no leniency for a party's failure to meet those requirements. See, e.g., *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875 (5th Cir. 2004). (Trial court did not abuse its discretion in barring insured's treating physician's testimony on causation on ground that insured did not timely designate witness as expert; insured did not explain why he failed to timely designate expert, and insurer did not have reason to know insured intended to call witness); *Brainard v. American Skandia Life Assur. Corp.*, 432 F.3d 655 (6th Cir. 2005) (District court did not abuse its discretion, on motion for summary judgment, in excluding expert's affidavit setting out opinion that was not

included in expert's report under discovery rules, where report had not been supplemented to include any omitted information, as required by discovery rules).

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT ENTERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL IN NOT FINDING THAT THE DISTRICT COURT HAD FAILED TO EXERCISE ANY GATEKEEPING FUNCTION UNDER *DAUBERT* BY ALLOWING THE USE OF EXPERT TESTIMONY WHICH DID NOT IN ANY WAY COMPLY WITH *DAUBERT* OR ITS PROGENY *GENERAL ELECTRIC COMPANY* AND *KUMHO TIRE.*

As noted by the Seventh Circuit in this case, it reviews de novo the district court's application of the *Daubert* framework, that is, whether the district court assessed the reliability and relevance of the proffered testimony. *Jenkins v. Bartlett, supra,* at 489. The court stated in this regard:

> The fact-specific nature of the *Daubert* gatekeeping inquiry vests considerable latitude in the trial court, both in determining the method by which the reliability of the proposed expert testimony will be measured and whether the testimony is, in fact, reliable. *Id.* at 152, 119 S.Ct. 1167. To ensure that the trial court has fulfilled its gatekeeping responsibility, while still affording it the necessary latitude to meet the circumstances of the case, we employ a two-part inquiry. *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 816 (7th Cir. 2004). First, we review de novo the district court's application of the *Daubert* framework, i.e., whether the district court assessed the reliability and relevance of the proffered testimony. *Id.* If the district court properly applied the *Daubert* framework, we then review the district court's ultimate decision to

admit or to exclude the testimony for an abuse of discretion. *Id.*

"Reliability" in this context means, among other things, that a district court, and the Court of Appeals in its de novo review, is expected to reject any subjective belief or speculation offered in thie guise of expert testimony. *Ammons v. Aramark Uniform Services, Inc.*, 368 F.3d 809, 816 (7th Cir. 2004). Here, the Petitioner submits that the Seventh Circuit, much like the District Court before it, failed to apply the *Daubert* analysis to the proffered testimony, with the result that speculative, and highly prejudicial, expert testimony was allowed into evidence. The "considerable latitude" which the Seventh Circuit afforded the District Court was, in fact, so deferential and unquestioning as to be in conflict with *Daubert* itself and with the decisions of other Courts of Appeal.

ANALYSIS

The record in this case reflects that both the trial court and the Seventh Circuit abdicated the "gatekeeping" function given to them by *Daubert*, by allowing the Defendants to use expert testimony by Dr. Mainland, in particular, that was inherently speculative and conjectural. *Jenkins v. Bartlett, supra,* at 488-90. The Seventh Circuit did not conduct the sort of analysis mandated after *Daubert* and, instead, in a conclusory fashion, simply rejected the Appellant's challenge to the speculative testimony. Moreover, far from demanding that the gatekeeping function be fulfilled, the Court in this case erred by effectively placing the burden on the Petitioner to show that the conclusions of Dr. Mainland were not reliable or speculative:

> Although, at trial, Ms. Jenkins identified what she believed to be shortcomings in Dr. Mainland's reconstruction of the shooting, she did not explain how

> these alleged shortcomings would affect the reliability of Dr. Mainland's conclusions. No attempt was made to show that the absence of these analyses caused Dr. Mainland's investigation to fall below the level of intellectual rigor employed by an expert in the field. For example, although Ms. Jenkins seemed to find it significant that Dr. Mainland could not say whether Officer Bartlett had fired from the ground or from the hood of the car, Ms. Jenkins did not explain how such knowledge, or the lack thereof, would affect the reliability of Dr. Mainland's opinion testimony. Ms. Jenkins simply made the unsupported and conclusory statement that lack of this knowledge rendered Dr. Mainland's conclusions "conjecture and speculation." *Id.* at 6. *Jenkins v. Bartlett, supra,* at 489-90.

In so acting, the Seventh Circuit put itself in stark conflict with other Circuits that have demanded more rigorous scrutiny and analysis of expert testimony offered under *Daubert.* The Court should settle that conflict in this proceeding.

For example, in *Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986 (8th Cir. 2001), the Eighth Circuit applied the principle that the district court's gatekeeping role under *Daubert* must be used to separate expert opinion evidence based on "good grounds" from subjective speculation that masquerades as scientific knowledge. Thus, in that case, the district court found that experts proffered by a mother to prove that her intracerebral hemorrhage (ICH) was caused by ingestion of a drug to suppress postpartum lactation lacked a proper basis for "ruling in" the drug as a potential cause of ICH in performing differential diagnoses, given the absence of scientifically convincing evidence that the drug acted as a vasoconstrictor or could cause ICH. The trial court accordingly found that the experts' medical causation

testimony was inadmissible in the mother's products liability action against a drug manufacturer. See also *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233 (11th Cir. 2005) (Proffered testimony by expert in pharmacology that weight-loss supplement containing ephedrine and caffeine caused vasospasm and vasculitis, which in turn caused strokes and heart attacks and that adding caffeine made it more toxie, was insufficiently reliable under *Daubert* to be admissible in toxic tort action brought by users of the supplement who suffered either ischemic strokes or heart attacks; expert drew speculative conclusions about the supplement's toxicity from questionable principles of pharmacology, while at the same time, neglected the hallmark of the science of toxic torts, the dose-response relationship, drew unsubstantiated analogies between ephedrine and phenylpropanolamine, a drug from the same class as ephedrine, inferred conclusions from studies and reports that the papers did not authorize, and unjustifiably relied on government public health reports and consumer complaints).

As stated by the Tenth Circuit, it is critical that, in addressing the admissiblity of proffered expert testimony, the district court determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist. *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003) (District court did not perform its *Daubert* gatekeeper function with respect to expert testimony of geologist offered by residents to establish environmental contamination of and around residents' property and to show that contamination was caused by uranium mill, and with respect to doctors' expert testimony offered to show that residents' maladies were caused by harmful substances released by mill, such that admission of ex-

perts' testimony was abuse of discretion, inasmuch as court did not make adequate findings on the record to ensure that testimony was both relevant and reliable and that particular opinions were based on valid reasoning and reliable methodology). Without specific findings or discussion on the record showing that the district court performed its duty as gatekeeper in admitting expert testimony, a Court of Appeals must conclude that the district court abused its discretion in admitting such testimony. *Id.* at 1223. The gatekeeper function requires the judge to assess the reasoning and methodology underlying the expert's opinion, and determine whether it is both scientifically valid and applicable to a particular set of facts; where the expert testimony's factual basis, date, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. *Id.* at 1221-22.

Saying that it is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate, the Tenth Circuit has also had occasion to reject highly speculative expert testimony in the specific context of a case alleging excessive force by police officers. *See Christiansen v. City of Tulsa,* 332 F.3d 1270 (10th Cir. 2003). (Exclusion of portions of summary judgment affidavit in which suicide victim's psychiatrist opined as to what might have happened during police standoff which ended with victim's infliction of his fatal gunshot wound if psychiatrist been allowed to intervene was not abuse of discretion, in §1983 action against police officers by victim's survivors, given that statements were pure speculation, that victim had been asked during standoff whether he wanted to see his psychiatrist and

never responded, and that such information, which had not been conveyed to police during standoff, had little, if any, probative value).

Bearing in mind that, in the case at bar, Dr. Mainland offered what purported to be expert testimony on crucial issues pertaining to the dimensions of the automobile in which the decedent was sitting, and the position of his body when he was shot, the Second Circuit, unlike the Seventh Circuit here, has rejected speculative testimony of this kind. In *Brooks v. Outboard Marine Corp.*, 234 F.3d 89 (2d Cir. 2000), a trial court's determination that testimony of a proposed expert in a products liability action brought by a boater whose hand was amputated by an outboard boat motor was speculative and unreliable was not an abuse of discretion.

In contrast with the absence in the record in this case of a searching inquiry by the District Court in its gatekeeping role, the magistrate (whose recommendation was adopted by the district court) in Brooks scrutinized the proffered expert testimony and determined that the expert had never seen the actual boat or motor either in person or in photographs, had never spoken to either the boater or his companion, was unaware of the boat's dimensions and placement of seats in relation to the motor, and did not know precisely what happened and where the passengers were positioned in time immediately preceding the accident.

In short, the gatekeeping role of the federal trial courts is an active role, as opposed to the passivity of the District Court in this case when it was faced with the offer of pivotal expert testimony. In *Daubert*, itself, the Court stated that ". . . the trial judge must endure that any and all scientific testimony or evidence admitted is not only

relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra,* 509 U.S. at 589. The Court further summarized the import of its decision, as follows:

> 'General acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. *Id.* at 597 (emphasis added).

In a manner that is in conflict with precedents from other Courts of Appeal, in this case the Seventh Circuit erred by affirming the decision of the District Court, notwithstanding that the result at trial was in large part the product of expert testimony that had been admitted into evidence without fulfillment of the District Court's gatekeeping responsibilities under *Daubert.*

CONCLUSION

One can observe that *Daubert, Kumho Tire Company* and *General Electric Company* related to the application of the Federal Rules of Evidence 702 when there was an economic interest at stake. This case involves individual liberties, whether Officer Bartlett was engaged in the unreasonable use of force in violation of the Fourth Amendment to the U.S. Constitution of Larry Jerome Jenkins. Unlike *Daubert, General Electric Company* and *Kumho Tire,* there has not been the intensive rigor and pertinent inquiry regarding the admissibility of the expert testimony of Dr. Mainland and Dr. Jentzen. A critical issue in this case was whether the decedent, Larry Jerome Jenkins, was driving the car, behind the steering wheel or whether he was touching the steering

wheel. The Court allowed the testimony of Dr. Jentzen and Dr. Mainland to be admitted. This testimony was used to bolster the testimony of the police officer Bartlett. Inconsistent with the rules promulgated under *Daubert, General Electric* and *Kumho Tire*, the Seventh Circuit and the District Court were simply lax in conducting the "gatekeeping" functions as articulated by this court.

There appears to be a spectrum from the various courts of appeal in ascertaining an abuse of discretion. Nowhere on the spectrum does the submission of an expert report begin with the writing of the report by an attorney for a party and a subsequent ratification of the attorney's written report by the proposed experts. This appears to be such a flagrant violation of the discovery rules for expert testimony and for admission of evidence pursuant to Federal Rules of Evidence 702.

This court should now hear this case to clearly define the spectrum as to what constitutes an abuse of discretion for discovery sanctions and for application of Federal Rules of Evidence 702.

Respectfully submitted,

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September 17, 2007

APPENDIX A

[Filed June 19, 2007]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 19, 2007

Before
Hon. FRANK H. EASTERBROOK, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

No. 06-2495

DEBRA JENKINS, Mother, Special Administrator
and Personal Representative of the Estate of
Larry Jerome Jenkins, Estate of Larry Jerome Jenkins,
Briana L. Jenkins-Benning, Decedent's Minor child,
et al.,

Plaintiffs-Appellants,

v.

JON BARTLETT,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin

No. 02 C 1136

David R. Herndon, *Judge.*

ORDER

Upon consideration of appellants' petition for rehearing, filed on May 7, 2007, the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby DENIED.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 06-2495

DEBRA JENKINS, Mother, Special Administrator and Personal Representative of the Estate of Larry Jerome Jenkins, ESTATE OF LARRY JEROME JENKINS, BRIANA L. JENKINS-BENNING, Decedent's Minor Child, et al.,

Plaintiffs-Appellants,

v.

JON BARTLETT,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 02 C 1136—**David R. Herndon**, *Judge.*

ARGUED DECEMBER 8, 2006—DECIDED APRIL 23, 2007

Before EASTERBROOK, *Chief Judge*, and POSNER and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Debra Jenkins, on behalf of the estate of her son, Larry Jenkins, filed this action under 42 U.S.C. § 1983 against Jon Bartlett, a police officer in the Milwaukee Police Department ("MPD"). She alleged that

Officer Bartlett had violated Mr. Jenkins' constitutional rights through the use of excessive force when he shot and killed Mr. Jenkins as he attempted to flee custody.[1] Ms. Jenkins also brought § 1983 claims against the City of Milwaukee ("City") and Arthur Jones, the Chief of the MPD at the time Mr. Jenkins was shot, under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). She alleged that the City and Chief Jones were deliberately indifferent to Mr. Jenkins' constitutional rights in the training and supervision of Milwaukee police officers with respect to the use of deadly force on suspects in vehicles ("*Monell* claims"). The district court granted summary judgment in favor of the City and Chief Jones on Ms. Jenkins' *Monell* claims and, following a trial, a jury found that Officer Bartlett had not violated Mr. Jenkins' constitutional rights. Ms. Jenkins appeals the district court's grant of summary judgment in favor of the City and Chief Jones on her *Monell* claims. Ms. Jenkins also appeals two of the district court's evidentiary rulings. For the reasons set forth in this opinion, we affirm the judgment of the district court.

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[1] Originally, Ms. Jenkins also brought claims on behalf of herself and Mr. Jenkins' children for loss of society and companionship. The district court dismissed the claims brought on behalf of Mr. Jenkins' children, determining that Ms. Jenkins lacked standing to assert their claims. The district court later granted Officer Bartlett's motion to dismiss Ms. Jenkins' personal claim for loss of society and companionship following our decision in *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005), which held that surviving parents had no independent constitutional right to recover for loss of society and companionship of an adult child incidental to state action. *Id.* at 791. Ms. Jenkins does not appeal these rulings.

I

BACKGROUND

A.

On the night of September 19, 2002, Officer Bartlett was on duty with Officer Kurt Lacina. Officers Bartlett and Lacina stopped a black Jeep that they suspected of involvement in drug-related activity. As the officers approached, Mr. Jenkins exited the vehicle. Officer Bartlett searched him for weapons and decided to place him in the squad car while the officer completed his investigation. Before he could be secured in the car, Mr. Jenkins fled on foot and Officer Bartlett, also on foot, pursued him. After a one- to two-minute pursuit, Mr. Jenkins entered an occupied vehicle.

Believing that Mr. Jenkins was attempting to car-jack the vehicle, Officer Bartlett drew his service weapon and approached the vehicle from the front. Mr. Jenkins now was in the driver's seat behind the steering wheel. The vehicle moved toward Officer Bartlett and struck the officer. Accounts differ as to the speed at which the vehicle was traveling and whether the vehicle swerved to strike him. When the vehicle struck Officer Bartlett, he was thrown onto the vehicle's hood. Officer Bartlett then fired nine shots into the vehicle, seven of which struck Mr. Jenkins. Mr. Jenkins died of his wounds.

After the shooting, pursuant to MPD policy, Officer Bartlett was taken to MPD detective bureau headquarters, and an investigation was begun immediately by both the criminal and Internal Affairs divisions of MPD. As was department custom, Bradley DeBraska, the police liaison officer for the City and president of the Milwaukee Police Association, was contacted following the shooting.

DeBraska and an attorney appointed by the police officers' association, Jonathan Cermele, met Officer Bartlett at MPD headquarters. Throughout the evening, DeBraska gathered information and advised Cermele as the attorney prepared to represent Officer Bartlett during his interview with Internal Affairs.

The results of the criminal investigation were sent to the Milwaukee County District Attorney's Office. The district attorney found no basis to file criminal charges against Officer Bartlett. The investigation by Internal Affairs concluded that Officer Bartlett had not violated any MPD policy in the course of the shooting.

B.

Ms. Jenkins then brought this action on behalf of Mr. Jenkins' estate. She alleged that Officer Bartlett's use of deadly force was excessive and had violated Mr. Jenkins' Fourth Amendment rights. She also alleged that the City and Chief Jones had exhibited deliberate indifference to Mr. Jenkins' constitutional rights by failing to train properly and to supervise MPD officers with respect to the exercise of deadly force on suspects in vehicles. She based this claim on MPD's alleged failure to train properly its officers according to MPD's own training bulletins for approaching and exercising deadly force on suspects in vehicles. She also pointed to past incidents in which MPD officers had used deadly force on suspects in vehicles.

As the case proceeded, the district court set November 1, 2003 as the deadline for Officer Bartlett, the City and Chief Jones (collectively, "defendants") to provide Ms. Jenkins the disclosures related to expert witnesses required by Rule

26(a)(2) of the Federal Rules of Civil Procedure.[2] On October 1, 2003, Susan Lappen, the attorney for the defendants, sent Ms. Jenkins' attorney a letter that identified the expert witnesses the defendants expected to call, their anticipated testimony and the bases for the opinions to which the experts would testify, including the autopsy protocol the defendants previously had provided to Ms. Jenkins. This letter identified Dr. Jeffrey Jentzen, the Milwaukee County Medical Examiner, and Dr. Mary Mainland, an Assistant Medical Examiner, as potential experts; these physicians had been involved in the autopsy of Mr. Jenkins and in a reconstruction of the shooting. Attached to the letter, Attorney Lappen included each physician's curriculum vitae. Neither physician signed the letter, but both subsequently provided sworn affidavits adopting the contents of the letter.

Ms. Jenkins objected to the proposed testimony of the physicians. She submitted that the defendants' disclosures did not satisfy Rule 26(a)(2)(B)'s requirement for an expert report. The objection did not specify the deficiencies of the disclosure. The district court denied the motion, noting that Ms. Jenkins had not stated the basis for her objection and that the physicians subsequently had adopted Lappen's letter by sworn affidavit that had cured any defect in the report.

The defendants then moved for summary judgment. The district court denied Officer Bartlett's motion for summary judgment based on the defense of qualified immunity: It held that genuine issues existed as to the reason-

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[2] The deadline originally was set for October 1, 2003, but the district court extended the deadline to November 1, 2003. *See* R.42.

ableness of the use of deadly force. The district court granted summary judgment in favor of the City and Chief Jones: It held that Ms. Jenkins had "failed to articulate any deficiency in the training of MPD officers" or in the inadequacy of investigations of prior incidents in which MPD officers had exercised deadly force on suspects in vehicles. R.99 at 13. After this order, only Officer Bartlett remained as a defendant.

Before trial, the judge originally assigned to the case, Judge Stadtmueller, was replaced by Judge Herndon. After Judge Herndon assumed responsibility for the case, Ms. Jenkins again moved to exclude the testimony of Dr. Mainland, again arguing that Lappen's October 1, 2003 letter did not "comply with the rules for an expert report" and added that Dr. Mainland's opinions were not "rationally based" and had "no relevance other than being highly suggestive." R.125 at 5-6. Judge Herndon denied the motion, noting that Ms. Jenkins had not shown any cause to disturb Judge Stadtmueller's earlier decision. At trial, Ms. Jenkins again attempted to exclude Dr. Mainland's testimony. She contended that the basis for Dr. Mainland's proposed opinion testimony about the position in which Mr. Jenkins was sitting when he was shot did not satisfy the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for reliability of expert testimony. The district court denied Ms. Jenkins' motion.

Ms. Jenkins also sought to call DeBraska and Cermele as witnesses. Officer Bartlett objected, asserting attorney-client privilege and work product protection. After taking testimony on the matter, the district court ruled that DeBraska's presence during Officer Bartlett's conversations with Cermele did not destroy the attorney-client

privilege because DeBraska was acting as Cermele's agent by assisting Cermele in rendering legal services to Officer Bartlett. Therefore, the district court held, Ms. Jenkins could not call DeBraska or Cermele to testify.

The jury returned a verdict in favor of Officer Bartlett. Ms. Jenkins now appeals.

II

DISCUSSION

Ms. Jenkins raises three issues on appeal. First, Ms. Jenkins submits that the district court erred when it allowed Drs. Jentzen and Mainland to testify as expert witnesses because the defendants had failed to provide an expert report that satisfied Federal Rule of Civil Procedure 26(a)(2)(B) and because their testimony did not satisfy the *Daubert* standard for reliability of expert testimony offered under Federal Rule of Evidence 702. Next, she contends that the district court erred when it sustained Officer Bartlett's claim of attorney-client privilege despite DeBraska's presence during conversations between Officer Bartlett and Cermele. Lastly, Ms. Jenkins challenges the district court's grant of summary judgment on her *Monell* claims against the City and Chief Jones. We shall address each of these issues.

A. Expert Testimony

Ms. Jenkins contends that the district court erred when it permitted Drs. Jentzen and Mainland to testify as experts on behalf of Officer Bartlett. She raises two separate objections to the district court's ruling that permitted the physicians to testify as experts. First, she contends that the

physicians' testimony should have been barred because Officer Bartlett failed to provide an expert report that satisfied Federal Rule of Civil Procedure 26(a)(2)(B). Second, Ms. Jenkins submits that the physicians' testimony should have been excluded under Federal Rule of Evidence 702 because it failed to satisfy the *Daubert* standard for reliability of expert testimony.

1. Federal Rule of Civil Procedure 26(a)(2)(B)

Rule 26(a)(2) requires parties to disclose the name of any person the party may call to testify as an expert under Federal Rule of Evidence 702. Fed. R. Civ. P. 26(a)(2)(A). When the potential witness "is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony," the disclosure must also include a "written report prepared and signed by the witness." Fed. R. Civ. P. 26(a)(2)(B). This report must include:

> a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Id. The purpose of the report is to "set forth the substance of the direct examination." Fed. R. Civ. P. 26 advisory

committee's note. The required disclosures must be made within the time frame directed by the court. Fed. R. Civ. P. 26(a)(2)(C). A party is barred from using at trial evidence that it failed to disclose "without substantial justification" as required by Rule 26(a), unless that failure was harmless. Fed. R. Civ. P. 37(c)(1) & advisory committee's note.

To comply with this rule, the defendants submitted a letter on October 1, 2003 prepared by their attorney. The letter identified Drs. Jentzen and Mainland as expert witnesses, provided each witness' curriculum vitae, and stated the expected testimony and the basis for that testimony, including the autopsy protocol which already had been provided to Ms. Jenkins. Ms. Jenkins received this letter within the time designated by the court. Although the letter was not prepared or signed by either physician, both physicians subsequently submitted affidavits adopting the contents of the letter. The district court held there had been substantial compliance with Rule 26(a)(2).[3] *See* R.74 at 9-10.

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[3] Ms. Jenkins did not state any basis for her objection to the expert report. *See* R.74 at 9. The district court noted that the absence of the physicians' signatures from the letters left the reports in technical noncompliance with Rule 26(a)(2)(B), but further noted that Ms. Jenkins provided no authority that would support excluding the physicians' testimony in light of the physicians' subsequent affidavits adopting the contents of the letter. *Id.* at 10. Ms. Jenkins renewed this objection after Judge Herndon replaced Judge Stadtmueller, again without stating how the report failed to comply with Rule 26(a)(2)(B). *See* R.125 at 5. Judge Herndon denied this motion, noting that Ms. Jenkins had provided no reason to justify reconsideration of Judge Stadtmueller's order. R.135 at 3-4.

Ms. Jenkins now appeals this ruling. We review a district court's discovery rulings on the exclusion of expert testimony for an abuse of discretion. *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 755 (7th Cir. 2004). We shall not find an abuse of discretion unless "(1) the record contains no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary." *Id.* (quoting *Sherrod v. Lingle*, 223 F.3d 605, 610 (7th Cir. 2000)) (internal quotation marks omitted).

The district court did not abuse its discretion by permitting Drs. Jentzen and Mainland to testify despite any shortcomings in the expert report submitted by the defendants. With the exception of the physicians' signatures, the letter substantially complied with Rule 26(a)(2)(B). The letter stated the opinions to which the physicians would testify and the basis for those opinions, invited Ms. Jenkins' attention to the autopsy protocol which she already had received, disclosed prior testimony by Dr. Jentzen in federal court, and set forth the physicians' qualifications and publications in their respective curriculum vitae. Further, the plaintiffs cured the main defect in the expert report, the absence of the physicians' signatures, by submitting sworn affidavits from the physicians adopting the contents of the October 1, 2003 letter. Under these circumstances, the district court did not abuse its discretion by holding that any shortcoming in the defendants' disclosure was harmless.

2. *Daubert* Standard

Ms. Jenkins also contends that Dr. Mainland's testimony should have been excluded under Federal Rule of Evidence 702.[4] Under the *Daubert* gatekeeping requirement, the district court has a duty to ensure that expert testimony offered under Federal Rule of Evidence 702 is both relevant and reliable. *See Kumho Tires Co. v. Carmichael*, 526 U.S. 137, 147 (1999). The goal of *Daubert* is to assure that experts employ the same "intellectual rigor" in their courtroom testimony as would be employed by an expert in the relevant field. *Id.* at 152. Whether proposed expert testimony is sufficiently reliable under Rule 702 is dependent upon the facts and circumstances of the particular case. *See id.* at 150.

The fact-specific nature of the *Daubert* gatekeeping inquiry vests considerable latitude in the trial court, both in determining the method by which the reliability of the proposed expert testimony will be measured and whether the testimony is, in fact, reliable. *Id.* at 152. To ensure that the trial court has fulfilled its gatekeeping responsibility, while still affording it the necessary latitude to meet the circumstances of the case, we employ a two-part inquiry. *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 816 (7th Cir. 2004). First, we review de novo the district court's application of the *Daubert* framework, i.e., whether the district court assessed the reliability and relevance of the proffered testimony. *Id.* If the district court properly applied the *Daubert* framework, we then review the district court's ultimate decision to admit or to exclude the testimony for an abuse of discretion. *Id.*

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[4] Ms. Jenkins does not appear to challenge Dr. Jentzen's testimony under Federal Rule of Evidence 702.

Ms. Jenkins submits that Dr. Mainland's opinion was not reliable because it was based on speculation. Prior to trial, Ms. Jenkins objected to Dr. Mainland's testimony on the ground that it was "not rationally based," "highly suggestive" and likely to confuse the jury; she offered no further explanation. R.125 at 6. At trial, Ms. Jenkins contended that Dr. Mainland's opinion testimony based on Dr. Mainland's reconstruction of the shooting was not reliable because Dr. Mainland had not done a "dimensionally analysis" as part of the reconstruction. R.203 at 3. Ms. Jenkins noted that, by Dr. Mainland's own admission, Dr. Mainland did not know whether Officer Barlett had fired from the ground or from the hood of the vehicle. *See id.* at 4, 6. As a result, Ms. Jenkins submitted, Dr. Mainland's opinion testimony was nothing more than "conjecture and speculation." *Id.* at 6. In response, Officer Bartlett pointed to Dr. Mainland's qualifications, her personal knowledge gained from conducting the autopsy of Mr. Jenkins and her investigation of the vehicle in which Mr. Jenkins was shot. *Id.* at 5. The district court noted that it had applied the *Daubert* analysis when it denied Ms. Jenkins' pre-trial motion and again denied her motion. *Id.* at 6-7.

The record makes clear that the district court directed its inquiry into the reliability of the proffered testimony.[5] As the proponent of Dr. Mainland's testimony, Officer Bartlett provided the court with ample grounds to find Dr. Mainland's testimony reliable. Although, at trial, Ms. Jenkins identified what she believed to be shortcomings in Dr. Mainland's reconstruction of the shooting, she did

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[5] Ms. Jenkins does not contend that Dr. Mainland's testimony was not relevant.

not explain how these alleged shortcomings would affect the reliability of Dr. Mainland's conclusions. No attempt was made to show that the absence of these analyses caused Dr. Mainland's investigation to fall below the level of intellectual rigor employed by an expert in the field. For example, although Ms. Jenkins seemed to find it significant that Dr. Mainland could not say whether Officer Bartlett had fired from the ground or from the hood of the car, Ms. Jenkins did not explain how such knowledge, or the lack thereof, would affect the reliability of Dr. Mainland's opinion testimony. Ms. Jenkins simply made the unsupported and conclusory statement that lack of this knowledge rendered Dr. Mainland's conclusions "conjecture and speculation." *Id.* at 6. Under these circumstances, we cannot say that the district court abused its discretion in finding that the proposed testimony of Dr. Mainland was sufficiently reliable.

B. Attorney-Client Privilege

Ms. Jenkins next submits that it was error for the district court to sustain Officer Bartlett's claim of attorney-client privilege with respect to his conversations with Cermele made in the presence of DeBraska, a third party. The scope of the attorney-client privilege is a question of law which we review de novo. *See United States v. BDO Seidman*, 337 F.3d 802, 809 (7th Cir. 2003). We review the district court's findings of fact and application of law to fact in connection with a claim to attorney-client privilege for clear error. *See United States v. Frederick*, 182 F.3d 496, 499 (7th Cir. 1999) (application of law to fact); *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (findings of fact).

On the night of the shooting, DeBraska came to the police station to assist Cermele, Officer Bartlett's attorney, as Cermele prepared to represent Officer Bartlett at his interview with Internal Affairs. DeBraska testified that it had been custom since the 1960s for a person in his position to come to the police station after an officer had been involved in a shooting to assist the officer's attorney in providing legal services to the officer by gathering information and assuring that the attorney's representation followed department rules. R.200 at 54, 59. Officer Bartlett's testimony was consistent with DeBraska's account of the events of the evening. He stated that DeBraska had been present during his conversations with Cermele in order to facilitate communications between the two. *Id.* at 30, 46, 50.

The district court held that DeBraska's presence during Officer Bartlett's conversations with Cermele did not destroy the attorney-client privilege. *Id.* at 81. The court recognized that, ordinarily, the presence of a third person would destroy the attorney-client privilege, but noted the exception for the presence of an agent assisting the attorney in rendering legal services. *Id.* at 79-80. Based on the testimony of Officer Bartlett and DeBraska, the court held that DeBraska was present at the police station on the night of the shooting as an adjunct of Officer Bartlett's attorney. *Id.* at 80. The court found that DeBraska was there to assist Cermele by gathering information and by providing "expert advice on the rules and procedures of the department" to facilitate Cermele's representation of Officer Bartlett. *Id.* Under these circumstances, the court found that DeBraska "play[ed] the same role as would a paralegal in a law office, a secretary, or anyone else connected with the office." *Id.*

The attorney-client privilege protects communications made in confidence by a client to his attorney in the attorney's professional capacity for the purpose of obtaining legal advice. *See Evans*, 113 F.3d at 1461. "[B]ecause the privilege is in derogation of the search for the truth, it is construed narrowly." *Id.* Thus, ordinarily, statements made by a client to his attorney in the presence of a third person do not fall within the privilege, even when the client wishes the communication to remain confidential, because the presence of the third person is normally unnecessary for the communication between the client and his attorney. *Id.* at 1462. However, there is an exception to the general rule that the presence of a third party will defeat a claim of privilege when that third party is present to assist the attorney in rendering legal services. 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 183 at 312 (2d ed. 1994).

Ms. Jenkins recognizes this exception, but insists that it is limited to those individuals who would be considered agents of the attorney under the law of master and servant. Nothing in our case law so limits the exception. This exception applies both to agents of the attorney, such as paralegals, investigators, secretaries and members of the office staff responsible for transmitting messages between the attorney and client, and to outside experts engaged "to assist the attorney in providing legal services to the client," such as accountants, interpreters or polygraph examiners. *Id.* at 313. Additionally, this exception reaches retained experts, other than those hired to testify, when the expert assists the attorney by transmitting or interpreting client communications to the attorney or formulating opinions for the lawyer based on the client's communications. *Id.* at 314.

Because there was no legal error in defining the scope of the claimed privilege, our review of the district court's decision sustaining Officer Bartlett's claim of privilege is limited to clear error. We shall reverse only if, on review of the entire evidence, we are "left with the definite and firm conviction that a mistake has been committed" in the application of the law to the facts. *Malachinski v. Comm'r*, 268 F.3d 497, 505 (7th Cir. 2001) (quoting *Coleman v. Comm'r*, 16 F.3d 821, 825 (7th Cir. 1994)) (internal quotation marks omitted). To support his claim of privilege, Officer Bartlett and DeBraska testified regarding DeBraska's activities on the night of the shooting as Officer Bartlett prepared to meet with Internal Affairs. Both testified that DeBraska was there solely to assist Cermele as he prepared to represent Officer Bartlett. Ms. Jenkins offered no evidence to contradict this testimony. The district court chose to credit the testimony of Officer Bartlett and DeBraska. Ms. Jenkins has offered no reason why the court should not have credited this testimony, and there is no other basis in the record to find the court's factual findings clearly erroneous.[6]

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[6] We note the narrowness of our holding in this regard. We do not suggest that an independent privilege exists for communications between an individual and his union representative. Nor do we imply that the presence of a union official while an individual discusses an ongoing investigation with his attorney never will abrogate a claim of privilege. However, where, as is the case here, the district court finds that a third party is present during conversations between an attorney and a client in preparation for an investigatory interview and the third party is present solely to assist the attorney in rendering legal services to the client, the third party's presence will

(continued...)

C. *Monell* Claims

Ms. Jenkins brought claims against the City and Chief Jones in his official capacity based on Officer Bartlett's alleged violation of Mr. Jenkins' constitutional rights. She alleged that they were deliberately indifferent to the rights of Mr. Jenkins in their failure to train and supervise Officer Bartlett. The district court granted summary judgment in favor of the City and Chief Jones with respect to Ms. Jenkins' claims; it could find no genuine issue of material fact with respect to the question of deliberate indifference.

We review a district court's grant of summary judgment de novo. *Alexander v. City of South Bend*, 433 F.3d 550, 554 (7th Cir. 2006). Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When the nonmoving party bears the ultimate burden of proof at trial, the nonmoving party must come forward with specific facts demonstrating an issue for trial to survive summary judgment. *Id.* at 324. Only disputes as to facts which are material, i.e., "facts that might affect the outcome of the suit under the governing law," and genuine, i.e., disputes for which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

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[6] (...continued)
not defeat a claim of privilege. The third party's status as a union representative is immaterial to the question of the attorney-client privilege.

A municipality may not be held liable under § 1983 based on a theory of respondeat superior or vicarious liability. *See Monell*, 436 U.S. at 694. A municipality only may be held liable under § 1983 for constitutional violations caused by the municipality itself through its own policy or custom. *Id.* Although a municipality may be directly liable for constitutional violations by its officers when the municipality evinces a deliberate indifference to the rights of the plaintiff by failing to train adequately its officers to prevent the violation, there can be no liability under *Monell* for failure to train when there has been no violation of the plaintiff's constitutional rights. *See Alexander*, 433 F.3d at 557 (noting that a municipality may not be held liable under *Monell* for failure to train adequately or to supervise its police officers when the plaintiff fails to demonstrate any constitutional violation by a municipal employee). The jury found that Mr. Jenkins' constitutional rights were not violated when Officer Bartlett fired upon him, thus the City cannot be held liable for any failure to train.

Even if that were not the case, Ms. Jenkins has not raised a genuine issue of material fact with respect to any deficiency in the City's training that could give rise to direct liability for a failure to train adequately its officers. A municipality will be held liable for the violation of an individual's constitutional rights for failure to train adequately its officers only when the inadequacy in training amounts to deliberate indifference to the rights of the individuals with whom the officers come into contact. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Proof of deliberate indifference requires more than "[a] showing of simple or even heightened negligence." *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407 (1997).

We shall find deliberate indifference on the part of policymakers only when such indifference may be considered a municipal policy or custom. *City of Canton*, 489 U.S. at 389. This may arise in either of two circumstances. First, a municipality acts with deliberate indifference when, "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights," that the deficiency exhibits deliberate indifference on the part of municipal policymakers. *Id.* at 390. Alternatively, we may find deliberate indifference when a repeated pattern of constitutional violations makes "the need for further training . . . plainly obvious to the city policymakers." *Id.* n.10.

Ms. Jenkins submits that, in light of several incidents in which MPD officers exercised deadly force on suspects in vehicles, the City and Chief Jones were deliberately indifferent to the rights of Mr. Jenkins when they failed to provide additional training or to exercise greater supervision. As the party on whom the burden of proof rested at trial, Ms. Jenkins was obligated to come forth with evidence to support this claim in order to survive summary judgment. Ms. Jenkins identified four incidents between August 1997 and September 2002, not including the shooting of Mr. Jenkins, in which Milwaukee police fired upon a suspect in a vehicle. R.90 at 101-12. Each incident was investigated by the MPD and no constitutional violations were found. Ms. Jenkins does not challenge the adequacy of these investigations. The evidence Ms. Jenkins presents shows only that four individuals were shot by MPD officers while in a vehicle; it does not show that each or any of these shootings amounted to a constitutional

violation.[7] This is not enough to provide the City or Chief

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[7] The first of the four prior shootings occurred in August 1997. In that incident, an MPD officer approached Victor Rodriguez, who the officer believed to be wanted for multiple armed robberies. When the officer instructed Rodriguez to lie on the ground on his stomach, Rodriguez jumped up, got into his car and closed the door. The officer approached Rodriguez's vehicle from the front to provide cover and to get a better view of Rodriguez. Rodriguez then reached for something on the floor or seat of the vehicle. The officer believed Rodriguez was reaching for a weapon and fired one shot into the vehicle's windshield. Rodriguez was not killed and ultimately was apprehended after fleeing the scene.

The second shooting occurred in July 1998. In that instance, an MPD officer approached a car from the front. As the officer approached, the vehicle began moving toward him. The officer stepped to the side and pointed his revolver into the vehicle. The weapon discharged accidentally and the driver, Antonio Davis, was killed.

The third shooting also occurred in July 1998, on the same day as the Davis incident. The third shooting involved Donnel Sims. There, two MPD officers approached Sims in his car. When the officers noticed open liquor bottles in the car, Sims began backing his vehicle away slowly. One of the officers then reached into the vehicle to shut off the ignition and Sims accelerated, dragging the officer. When Sims stopped the vehicle, the officer was thrown. After the officer was thrown, Sims attempted to flee the scene and the officer who had been dragged fired four shots into the vehicle. Sims was wounded but not killed.

The fourth shooting occurred in June 2002. Two MPD officers identified a vehicle as stolen. The officers pulled their squad car approximately 15 feet behind the vehicle and got out. The

(continued...)

Jones with actual or constructive knowledge that "the police . . . so often violate constitutional rights that the need for further training must have been plainly obvious." *City of Canton*, 489 U.S. at 390 n.10.

For these reasons, Ms. Jenkins has failed to raise a genuine issue of material fact with respect to her claims against the City and Chief Jones, and the district court's grant of summary judgment is affirmed.

Conclusion

Accordingly, we conclude that the district court did not abuse its discretion when it permitted Dr. Jentzen and Dr. Mainland to testify. Nor did the district court commit clear error by sustaining Officer Bartlett's claim of attorney-client privilege with respect to his conversations with Cermele in DeBraska's presence. Further, because Officer Bartlett did not violate Mr. Jenkins' constitutional rights, there can be no *Monell* liability on the part of the City or Chief Jones. In any event, Ms. Jenkins has failed to raise a genuine issue of material fact with respect to the *Monell*

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[7] (...continued)
driver of the stolen vehicle, Samuel Rodriguez, then accelerated his vehicle toward the driver's side of the squad car. At that time, the officer driving the squad car was outside of the squad car in between the driver's side door and the squad car's body. As Rodriguez approached, the officer identified himself as an MPD officer and fired one shot into Rodriguez's vehicle. Rodriguez's vehicle then struck the squad car, trapping the officer between the door and the body of the squad car, crushing him. The officer then fired another shot into Rodriguez's vehicle. Rodriguez died of the two gunshots.

liability of the City and Chief Jones for failure to train adequately Officer Bartlett. The decision of the district court is affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

[Filed Jan 15 2004]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 02-C-1136

DEBRA JENKINS (Mother, Special Administrator, and Personal Representative of the ESTATE OF LARRY JEROME JENKINS, on behalf of BRIANA LOREN JENKINS-BENNING, KHAYANNA LANAYE RUTHERFORD, KHYNEN LARRON RUTHERFORD, and NASHEEM JEROD JENKINS, Decedent's Minor Children),

Plaintiff,

v.

JON BARTLETT, ARTHUR JONES, and CITY OF MILWAUKEE,

Defendants.

ORDER

There are several pending discovery-related motions before the court: (1) plaintiff's motion to compel production of defendant Jon Bartlett's medical records; (2) defendant's motion to quash subpoenas issued to secretaries of former Milwaukee Police Chief Arthur Jones; (3) plaintiff's motion to compel the defendants

to respond fully to the seventh set of interrogatories and request for production of documents; and (4) plaintiff's motion to preclude expert testimony of Dr. Jeffrey Jentzen, Dr. Mary Mainland, and Sergeant Michael Kuspa.

DISCUSSION

A. Plaintiff's motion to compel production of defendant Jon Bartlett's medical records

The plaintiff alleges that defendant Bartlett, a police officer for the Milwaukee Police Department ("MPD"), used excessive force during the course of an arrest which resulted in the death of Larry Jerome Jenkins ("decedent"). The decedent was seated in the driver's seat of a stopped vehicle when defendant Bartlett shot the decedent through the windshield of the car. (Amended Complaint, ¶ ¶ 50, 59.) In his deposition, defendant Jon Bartlett testified that the car struck his legs, bruising and injuring his right knee. (*See* December 2, 2003 Nunnery Affidavit, Exhibit A.) Plaintiff's counsel indicated his intent to review defendant Bartlett's medical records during Bartlett's May 13, 2003 deposition, (*see id.*), and the plaintiff sought these medical records via letters to defendants' counsel dated September 29, 2003, and October 2, 2003, before issuing a subpoena on November 17, 2003. (*See* Nunnery Aff., Exhibits B, D, F.)

The defendants argue that the plaintiff should not be able to obtain defendant Bartlett's medical records related to the treatment of his legs because the plaintiff did not seek the medical records through formal, written discovery before November 1, 2003, thirty days before the December 1, 2003 discovery deadline. The court does not find this argument persuasive. The defendants received notice of the plaintiff's discovery requests,

although they were informal, before November 1, 2003. The court's September 25, 2003 order "charge[d] the parties with the responsibility to work through these [discovery] matters in good faith before seeking further court intervention." The court believes that the plaintiff's informal discovery requests were an attempt to comply with this court's order, and the court will not now ignore the motion to compel because the plaintiff first attempted to resolve the matter informally.

The defendants also argue that the records are not relevant to this litigation and that they are privileged from discovery in Wisconsin state court. *See* Wis. Stat. §905.04(2). First, the court finds that the medical records are relevant. The medical records are relevant because defendant Bartlett testified that he sustained injuries during the shooting accident which is the subject matter of this litigation. If the medical records show that Bartlett did not sustain injuries, the records may be admissible to impeach Bartlett. As discussed below, the court further believes that the medical records may be relevant to show whether Bartlett's use of force was excessive.

Second, the court finds that the medical records are not privileged in this case. Because the court's jurisdiction in this case is based upon a federal question, any privilege must be based upon federal common law. *See* Fed. R. Evid. 501 ("[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."); *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 506 (7th Cir. 1995) (holding that a claim for benefits under a qualified ERISA plan involves a federal question and, therefore, federal common law supplies the applicable rules of privi-

lege); *Equal Employment Opportunity Commission v. Illinois Department of Employment Security*, 995 F.2d 106, 107 (7th Cir. 1993) ("State privileges are honored in federal litigation only when state law supplies the rule of decision. When federal law governs, as it does here, only privileges recognized by the national government matter."). Federal common law does not recognize a physician-patient privilege. *Patterson*, 70 F.3d at 506-07, (citing *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977); *United States v. Bercier*, 848 F.2d 917, 920 (8th Cir. 1988)).

Even if this court were to apply Wisconsin state law pertaining to physician-patient privilege, the medical records would not be barred in this case because defendant Bartlett made his physical injuries an element of his defense. *See* Wis. Stat. §905.04(4)(c) (noting that there is no privilege where a "patient relies upon the condition as an element of the patient's claim or defense"). In this case, the plaintiff claims that defendant Bartlett unreasonably used deadly force by shooting the decedent while the decedent was sitting in a car. That was the same claim made in *Scott v. Edinburg*, 346 F.3d 752 (7th Cir. 2003). In *Scott*, one of the officer's defenses was that the decedent threatened him with a deadly weapon by trying to back over him with the car which made it reasonable for him to protect himself by using deadly force. *See id.* at 756-58. Defendant Bartlett also asserts that "the decedent's actions posed a threat of serious bodily injury or death to the officer." (Defendants' December 10, 2003 brief, at 2.; *see also* Answer, ¶¶55-58.) In support of this defenst, Bartlett testified at his deposition that the car that the decedent was occupying physically struck Bartlett's legs, causing injury to Bartlett. (*See* December 2, 2003 Nunnery Aff., Ex. A.)

Bartlett asserts that he believed that his life was in danger. (Answer, ¶¶55-57.) Whether the car actually struck Bartlett's legs and caused him injury is certainly relevant in determining whether Bartlett's belief and his actions were reasonable. *See Scott,* 346 F.3d at 756 ("The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . ."), (citing *Graham v. Connor,* 490 U.S. 386, 397 (1989)). "The fact-specific nature of whether an officer used excessive force depends on the totality of the circumstances surrounding the encounter." *Scott,* 346 F.3d at 756, (citing *Estate of Phillips v. City of Milwaukee,* 123 F.3d 586, 592 (7th Cir. 1997)). Through his answer and deposition testimony, Bartlett, therefore, clearly made his physical condition, his leg injuries, an element of his defense in this action. *See Ranft v. Lyons,* 471 N.W.2d 254, 257 (Wis. Ct. App. 1991) (finding that the defendant, through his deposition testimony, made his physical condition an element of his defense).

B. Defendants' motion to quash subpoenas issued to secretaries of former Milwaukee Police Chief Arthur Jones

The defendants move to quash subpoenas for deposition testimony issued to three secretaries of former Chief Jones. The defendants argue that the secretaries lack any information relevant to the pending litigation and that the plaintiff has not sought leave of the court to conduct more than ten depositions pursuant to Fed. R. Civ. P. 30(a)(2)(A).

The court will deny the motion to quash. The court grants the plaintiff leave to depose the three secretaries in accordance with Rules 26(b)(2) and 30(a)(2) of the Federal Rules of Civil Procedure. As the plaintiff notes,

the secretaries were present and taking notes at meetings in which defendant Jones discussed MPD's policy with respect to the use of deadly force in incidents involving motor vehicles. It is reasonable, therefore, to conclude that deposing the three secretaries may lead to the discovery of relevant information admissible at trial. *See* Fed. R. Civ. P. 26(b)(1).

C. Plaintiff's motion to compel the defendants to respond fully to the seventh set of interrogatories and request for production of documents

The plaintiff seeks notes taking during MPD command staff meetings as well as documents that Officer Lacina, a witness for the defendants, received but did not review prior to his deposition. The defendants respond that copies of command staff meeting minutes pertaining to the issue of training regarding weapons being discharged at motor vehicles were provided to the plaintiff in response to Request to Produce No. 1 from the plaintiff's sixth set of discovery demands. The defendant argues that a request to produce all staff meeting minutes over the span of five years would be overly broad and burdensome.

The court denies the plaintiff's motion to compel production of the documents provided to Lacina prior to his deposition because the plaintiff does not adequately set forth the basis of its argument. The plaintiff claims that she is entitled to this informatin to determine whether Lacina's testimony "has been influenced. That information is basically elementary." (Plaintiff's December 8, 2003 motion to compel, at 4-5.)

The court does not find that this snippet of argument unaccompanied by any legal citation merits the court's

analysis. If the plaintiff seeks to compel discovery, she must set forth a legal argument rather than assert that the information is "basically elementary." The court will not construct the plaintiff's argument for her.[1] *See Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996) ("Given our adversary system of litigation, '[i]t is not the role of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel.' ") (citations omitted).

The court also denies the plaintiff's motion to compel the minutes to the command staff meetings because the plaintiff failed to file a reply brief and because such a request appears overly broad. Because the plaintiff failed to file a reply brief, the court might therefore assume that the plaintiff has no legitimate reply to the defendants' brief in response, *see, e.g., Welsh & Katz, Ltd. v. Thornton-Trump*, 1990 WL 7171, *2 (N.D. Ill. Jan. 5, 1990), as appears to be the practice in Wisconsin state court. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 279 S.W.2d 493, 499 (Wis. Ct. App. 1979) (viewing a failure to refute a proposition as a concession of its correctness). Moreover, as the defendants indicate, they have already provided the plaintiff with certain minutes that might be related to the subject matter of this litigation. The plaintiff does not explain how a discovery request for the production of all staff meeting minutes over the span of five years is not overly broad or unduly burdensome.

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[1] The defendants' response on this issue is equally unhelpful. The defendants assert, without analytical support or legal citation, that the documents provided to Lacina were protected by the attorney-client privilege. (*See* Defendants' December 23, 2003 brief, at 5.)

D. Plaintiff's motion to preclude expert testimony of Dr. Jeffrey Jentzen, Dr. Mary Mainland, and Sergeant Michael Kuspa.

In her brief in support of this motion, the plaintiff tersely states that the defendants' submissions "do not adhere to Federal Rule 26(a)(2)(B)." (Plaintiff's November 12, 2003 brief, at 5.) The plaintiff offers no insight or analysis as to exactly how the defendants' submissions fail to comply with Rule 26.

Rule 26 of the Federal Rules of Civil Procedure requires parties to furnish expert reports to other parties in the following manner: the report shall be "prepared and signed by the witness" and shall contain "a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions . . . ." Fed. R. Civ. P. 26(a)(2)(B).

On October 1, 2003, counsel for the defendants provided a letter to plaintiff's counsel which purported to comply with Rule 26(a)(2)(B).[2] In the letter, defendants' counsel stated that Dr. Jeffrey Jentzen, the Medical Examiner for Milwaukee County, and Dr. Mary Mainland, an Assistant Medical Examiner for Milwaukee County, would testify that "Mr. Jenkins was in a fully upright and seated position, behind the steering wheel, with his right arm raised in an upward and extended position, at the time of the subject shooting incident." One of the bases for these opinions is a "reconstruction" that

[2]On October 8, 2003, the court granted the defendants' motion for enlargement, allowing the defendants to name expert witnesses on or before November 1, 2003.

was performed in the Milwaukee Police Department garage. The reconstruction was related to the body positioning of the decedent and the bullet paths in the subject shooting incident. The October 1, 2003 letter stated that this reconstruction occurred on July 18, 2003, when it, in fact, occurred on September 18, 2003. Jentzen and Mainland's resumes were also attached to the letter.

Because the plaintiff does not articulate how the October 1, 2003 letter fails to comply with Rule 29(a)-(2)(B), the court may dismiss the motion outright. It is possible that the plaintiff is aggrieved because Jentzen and Mainland's signatures did not appear in the October 1, 2003 letter. While the absence of their signatures may not be in technical compliance with Rule 26(a)(2)(B), both Jentzen and Mainland stated in their November 25, 2003 affidavits that they reviewed the October 1, 2003 letter and that the letter accurately represents their opinions. In light of these affidavits, the plaintiff does not offer any authority that their testimony should, nonetheless, be excluded.

The October 1, 2003 letter also stated that Sergeant Michael Kuspa would testify at trial. Kuspa's affidavit, summarizing his opinions, and his resume were attached to the October 1, 2003 letter. With scant analysis, the plaintiff suggests that Kuspa's affidavit does not comply with *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1983). The plaintiff also suggests that the form of Kuspa's report, an affidavit, is improper. First, the plaintiff abandons the *Daubert* argument in her reply brief. (*See* Plaintiff's December 2, 2003 brief.) Second, the plaintiff again fails to articulate how Kuspa's affidavit is inadequate in light of Rule 26. The court will

not prevent Kuspa from testifying at trial merely because his report is labeled an affidavit.

To allow the parties to comply fully with this order, the court will change the dispositive motion deadline in this action from January 15, 2004, to February 2, 2004.

Accordingly,

IT IS ORDERED that the plaintiff's motion to compel production of defendant Bartlett's medical records be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that the defendants' motion to quash subpoenas issued to secretaries of defendant Jones be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that the plaintiff's motion to compel the defendants to respond fully to the seventh set of interrogatories and request for production of documents be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that the plaintiff's motion to preclude expert testimony of Dr. Jeffrey Jentzen, Dr. Mary Mainland, and Sergeant Michael Kuspa be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that the dispositive motion deadline in this action be and the same is hereby **MODIFIED** from January 15, 2004, to February 2, 2004.

Dated at Milwaukee, Wisconsin, this 15th day of January, 2004.

BY THE COURT:

/s/ J. P. Stadtmueller
J. P. Stadtmueller
U.S. District Judge

APPENDIX D

[Filed Apr 10 2006]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 02-CV-1136-DRH

DEBRA JENKINS et al.,

Plaintiffs,

v.

JON BARTLETT et al.,

Defendants.

ORDER

HERNDON, District Judge:

Before the Court are several motions in limine submitted by both Plaintiff (Doc. 125) and Defendant (Doc. 126) in this matter. The Court considers these motions in turn, below.

I. *Plaintiff's Motions in Limine*

A. Motion I

First, Plaintiff moves to exclude references to the relevant neighborhood as a "high grime area, a drug dealing area, or of any other characteristics" under Federal Rules

of Evidence 402 and 403. (Doc, 125, p. 2.) The Court DENIES this motion. The nature of the neighborhood in which Defendant was operating is relevant in determining whether his conduct was reasonable. Because the reasonableness of Defendant's conduct is determined by "the totality of the circumstances surrounding the encounter," ***Scott v. Edinberg***, 346 F.3d 752, 756 (7th Cir. 2003), in other words, descriptions of the area in question are relevant in considering whether Defendant acted appropriately.

B. Motion II

Second, Plaintiff seeks an "advance" ruling that evidence demonstrating that Defendant "created the threat of serious physical harm to himself" should be admissible. (Doc. 125, p. 3.) Plaintiff does not identify or describe, however, the specific evidence that he seeks to admit, other than by generally indicating that this evidence will demonstrate that Defendant created the harm himself. Without further information or detail, the Court is unable at this time to determine whether this evidence is admissible. Accordingly, the Court DENIES at this time Plaintiff's motion for a ruling on the admissibility of the evidence referred to in his motion.

C. Motion III

Third, Plaintiff moves to preclude Sergeant Michael Kuspa and Lieutenant Steven Basting from "giving any opinion whatsoever" to the effect that ' "[Defendant] acted reasonably, and within the parameters established by his training and rule of procedure of the Milwaukee Police Department with reference to the subject shooting incident.' " Plaintiff argues that Sergeant Kuspa and

Lieutenant Basting's testimony will not be "rationally based," and therefore must be excluded under Federal Rules of Evidence 701 and 702. (Doc. 125, p. 4.) The Court **DENIES** this motion. Plaintiff provides no support for the assertion that Sergeant Kuspa and Lieutenant Basting will give testimony that is not "rationally based." Sergeant Kuspa and Lieutenant Basting are both veteran police officers with considerable knowledge of the Milwaukee Police Department's rules, policies, practices, and procedures. These officers are well-positioned to evaluate an officer's conduct.

D. Motion IV

Fourth and finally, Plaintiff moves to exclude the expert opinion of Dr. Mary K. Mainland that Larry Jenkins was seated in a car behind a steering wheel at the time of the shooting. (Doc. 125, pp. 506.) The Court **DENIES** this motion. Judge Stadtmueller, it should be noted, has already denied Plaintiff's attempt to preclude Dr. Mainland's expert opinions. (Doc. 74.) This Court knows of no changed circumstances in this case, and Plaintiff provides no good reason to reconsider Judge Stadtmueller's decision. *See* ***Brengettcy v. Horton***, 423 F.3d 674, 680 (7th Cir. 2005) ("Generally speaking, a successor judge should not reconsider the decision of a transferor judge at the same hierarchical level of the judiciary when a case is transferred. . . . 'The law of the case doctrine in these circumstances reflects the rightful expectation of litigants that a change of judges midway through a case will not mean going back to square one.' " (citing ***Best v. Shell Oil Co.***, 107 F.3d 544, 546 (7th Cir. 1997)). Plaintiff, further, declines to explain why Dr. Mainland's testimony is neither "factually [n]or rationally based," or why her testimony is misleading or confusing. A conclusory state-

ment that Dr. Mainland's testimony "does not comply with the rules for an expert report" is insufficient to preclude such testimony in light of Judge Stadtmueller's earlier order. *See Best*, 107 F.3d at 546 ("[T]he presumption is that earlier rulings will stand . . . .").

II. *Defendant's Motions in Limine*

A. Motion 1

First, Defendant moves to exclude "any other event" involving Defendant from trial. (Doc. 126, p. 1.) This motion is unopposed by Plaintiff. The Court **GRANTS** this motion. As Defendant notes, Plaintiff's only remaining claim in this case is a claim for excessive force. No other event involving Defendant is relevant to this claim. **Fed. R. Evid. 401, 402.**

B. Motion 2

Second, Defendant moves to exclude any matter "contained or referred to it [Defendant's] employment and/or personnel records, which were provided to plaintiff, under an order of confidentiality, during discovery in this case." (Doc. 126, p. 2.) Plaintiff does not oppose this motion. The Court **GRANTS** this motion. No matter referenced in such records is relevant to the sole remaining claim in this case. **Fed. R. Evid. 401, 402.**

C. Motion 3

Third, Defendant moves to exclude any matter involving any other officer, employed either by the Milwaukee Police Department or elsewhere. Plaintiff does not oppose this motion. The Court **GRANTS** this motion. (Doc. 126, p. 2.) Matters involving other law enforce-

ment officers are irrelevant to the issues in this case. **Fed. R. Evid. 401, 402.**

D. Motion 4

Fourth, Defendant moves to exclude (a) any suggestion that the decedent's children, the City of Milwaukee, or former Chief Jones are parties to this case: (b) any suggestion that the initial stop of the Prunskus vehicle was unconstitutiona, unlawful, or otherwise improper; (c) any suggestion that any Milwaukee Police Department policy, rule, practice, or custom regarding traffic stops, vehicle contacts, or use of force are unlawful or otherwise improper; (d) any suggestion that any Milwaukee Police Department policy, rule, practice, or custom regarding the investigation of officer-involved shootings is unlawful or otherwise improper; (e) any suggestion that the Milwaukee Police Department's hiring, supervision, or training of its personnel is unlawful or otherwise improper. Plaintiff does not oppose this motion. (Doc. 126, pp. 2-3.) The Court **GRANTS** this motion, consistent with Judge Stadtmueller's September 28, 2004 order. (Doc. 99.) Such testimony would be irrelevant to the sole remaining claim – against Defendant Jon Bartlett for excessive force – in this case. **Fed. R. Evid. 401, 402**

E. Motion 5

Fifth, Defendant moves to exclude any suggestion that "Mr. Jenkins' race played any part in Defendant's decision-making regarding Mr. Jenkins." (Doc. 126, p. 3.) Plaintiff does not oppose this motion. The Court **GRANTS** this motion. There isn't any evidence to support such ar. allegation, which the Court finds would be highly prejudicial.

F. Motion 6.

Sixth, Defendant seeks to exclude testimony from Plaintiff's expert D.P. Van Blaricom. (Doc. 126, pp. 3-4.) Plaintiff does not oppose this motion. The Court **GRANTS** this motion. Mr. Van Blaricom's testimony – which concerns already-dismissed ***Monell*** issues, alleged inconsistent statements, and scientific issues about which Mr. Baricom is unqualified to testify – is either improper or irrelevant with respect to any issue remaining in the case. **Fed. R. Evid. 401, 402, 702.**

IT IS SO ORDERED.

Signed this 10th day of April, 2006.

/s/ David R Herndon
United States District Judge

APPENDIX E

CITY OF MILWAUKEE

[SEAL]

Office of City Attorney
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October 1, 2003

Attorney Willie J. Nunnery
Nunnery Law Offices
Bank One Building-Suite 211
802 West Broadway
Madison, WI 53713-1865

Re: **Jenkins v. Bartlett, et al.**
Case No. 02-C-1136

Dear Mr. Nunnery:

Note that I have yet to receive word regarding whether Judge Stadtmueller has signed the proposed order, relative to extending the defendants' expert witness deadline to November 1, 2003. Therefore, I am naming expert witnesses on this date. However, I reserve the right to supplement this document, with additional expert witnesses, or with additional opinions of the expert witnesses I name today, after we have taken the deposition of plaintiff's expert, D.P. Van Blaricom, on October 6.

Should this case proceed to trial, the defendants will be calling the following as expert witnesses:

Sergeant Michael Kuspa: Sergeant Kuspa is the lead firearms trainer, or rangemaster, for the Milwaukee Police Department. Sergeant Kuspa's affidavit, which summarizes his opinions, is attached hereto. Attached to his affidavit is a copy of his resume, which includes a listing of his prior expert witness testimony.

Dr. Jeffrey Jentzen: Dr. Jentzen is the Medical Examiner for Milwaukee County. Attached is a copy of Dr. Jentzen's CV. Dr. Jentzen has testified many times as an expert in state court, due to his position. He has also testified as an expert in federal court. A listing of his prior federal testimony has been requested, and will be forwarded upon receipt. Dr. Jentzen was present during the course of Mr. Jenkins' autopsy. Furthermore, on July 18, 2003, Dr. Jentzen and Dr. Mainland, along with another representative from the Medical Examiner's Office, participated in a "reconstruction," relative to the body positioning of the decedent, as it related to bullet paths. This reconstruction was performed in the Milwaukee Police Department garage, below the police administration building, where the subject vehicle is being stored. Dr. Jentzen's opinions are consistent with the subject matter of the autopsy protocol. Furthermore, consistent with the information he reviewed, which includes the autopsy protocol, the reconstruction, and photographs generated from the Wisconsin Crime Lab, Dr. Jentzen will opine that Mr. Jenkins was in a fully upright and seated position, behind the steering wheel, with his right arm raised in an upward and extended position, at the time of the subject shooting incident.

Dr. Mary Mainland: Dr. Mainland is an Assistant Medical Examiner for Milwaukee County. A copy of her CV is attached. Dr. Mainland has not before testified in federal court. However, she has testified numerous times as an

expert in state court, due to her position. Dr. Mainland's testimony will be consistent with that of her deposition, along with the content of her autopsy protocol. Furthermore, as noted above, Dr. Mainland also participated in the above-described reconstruction. Dr. Mainland will further opine that Mr. Jenkins was in an upright and seated position, behind the steering wheel, with his right arm raised in an upward and extended position, at the time of the shooting.

Mr. Reginald Templin: Mr. Templin is the firearms expert for the Wisconsin State Crime Lab. A copy of Mr. Templin's CV is attached. Mr. Templin's opinions/testimony will be of the same subject matter as his deposition testimony.

Very truly yours,

/s/ Susan E. Lappen
SUSAN E. LAPPEN
Assistant City Attorney
SEL:lae
Enclosured
c: Dr. Jeffrey Jentzen
Dr. Mary Mainland
Mr. Reginald Templin
Sgt. Michael Kuspa

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 02-C-1136

DEBRA JENKINS,

Plaintiff,

v.

JON BARTLETT, ARTHUR JONES
AND CITY OF MILWAUKEE,

Defendants.

AFFIDAVIT OF DR. MARY K. MAINLAND

STATE OF WISCONSIN)
) ss.:
MILWAUKEE COUNTY)

Mary K. Mainland, being first duly sworn on oath, deposes and states as follows:

1. I am an Assistant Medical Examiner for Milwaukee County, Wisconsin.

2. I conducted the autopsy of Larry Jenkins, relative to the above-captioned case.

3. My deposition was conducted by the attorneys involved with this case on July 22, 2003.

4. During the course of that deposition, I thoroughly discussed my autopsy findings, as well as my autopsy protocol report.

5. Furthermore, on or about September 18, 2003, I participated with Dr. Jentzen and another representative from our office in a "reconstruction," relative to the bullet paths which passed through the subject motor vehicle and Mr. Jenkins.

6. During the month of September, 2003, our office was working on a reduced workweek, due to county budget cutbacks.

7. I was quite busy during that time, and did not have the time to prepare a written report, relative to the supplemental opinions I developed as a result of participating in the above-described reconstruction.

8. I requested that Ms. Lappen summarize those opinions, and I authorized her to do so in her expert witness designation.

9. I reviewed Ms. Lappen's summary of my anticipated trial testimony, as contained within her October 1, 2003 expert witness deisngation, and her summary of my supplemental opinions, in addition to the information contained in my autopsy protocol report, and my deposition testimony, accurately reflect my opinions in this case.

/s/ Mary K. Mainland, M.D.
Mary K. Mainland, M.D.

Subscribed and sworn to before me
this 24th day of November, 2003.

/s/ [Illegible]
Notary Public, State of Wisconsin
My commission is permanent.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 02-C-1136

DEBRA JENKINS,

Plaintiff,

v.

JON BARTLETT, ARTHUR JONES
AND CITY OF MILWAUKEE,

Defendants.

AFFIDAVIT OF DR. JEFFREY M. JENTZEN

STATE OF WISCONSIN)
) ss.:
MILWAUKEE COUNTY)

Jeffrey M. Jentzen, being first duly sworn on oath, deposes and states as follows:

1. I am the Medical Examiner for Milwaukee County, Wisconsin.

2. With reference to the above-captioned case, I was present during the course of the autopsy, which was conducted regarding Larry Jenkins.

3. Furthermore, on September 18, 2003, I, along with Dr. Mainland and another representative from my office,

participated in a "reconstruction," regarding the bullet paths which passed through the subject motor vehicle and Mr. Jenkins.

4. During the month of September, 2003, my office was working under a reduced workweek, due to county budget cutbacks.

5. I was quite busy during that time, and I authorized Ms. Lappen to summarize my anticipated expert opinions, which stemmed from the above-described reconstruction, to save me the time involved with preparing a separate report regarding same.

6. I reviewed Ms. Lappen's summary of my anticipated expert testimony, as delineated in her October 1, 2003 expert witness deisngation, and her summary, in addition to the information contained in the autopsy protocol report,

report, accurately represent my opinions in this case.

/s/ Jeffrey M. Jentzen, M.D.
JEFFREY M. JENTZEN, M.D.

Subscribed and sworn to before me
this 24th day oí November, 2003.

[Illegible]
Notary Public, State of Wicsonsin
My commission is permanent

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 02-C-1136

DEBRA JENKINS, (Mother, Special Administrator and Personal Representative of the ESTATE OF LARRY JEROME JENKINS, BRIANA LOREN JENKINS-BENNING, KHAYANNA LANAYE RUTHERFORD, KHYNEN LARRON RUTHERFORD and NASHEEM JEROD JENKINS, Decedent's Minor Children),

Plaintiff,

v.

JON BARTLETT, ARTHUR JONES and CITY OF MILWAUKEE,

Defendants.

AFFIDAVIT OF DR. MARY K. MAINLAND

STATE OF WISCONSIN)
MILWAUKEE COUNTY)

MARY K. MAINLAND, being first duly sworn on oath, deposes and states as follows:

1. I am an Assistant Medical Examiner for Milwaukee County, Wisconsin.

2. I conducted the autopsy of Larry Jenkins, relative to the above-captioned case.

3. My deposition was conducted by the attorneys involved with this case on July 22, 2003.

4. During the course of that deposition, I thoroughly discussed my autopsy findings, as well as my autopsy protocol report.

5. Furthermore, on or about September 18, 2003, I participated with Dr. Jentzen and another representative from our office in a "reconstruction," relative to the bullet paths which passed through the subject motor vehicle and Mr. Jenkins.

6. It is my opinion, to a reasonable degree of medical and forensic certainty, that Mr. Jenkins was in a fully upright and seated position, behind the sterring wheel, with his right arm raised in an upward and extended position, as if he were holding onto the steering wheel, at the time of the subject shooting incident.

/s/ Mary K. Mainland, M.D.
MARY K. MAINLAND, M.D.

Subscribed and sworn to before me
this 8th day of March, 2004.

/s/ [Illegible]
Notary Public, State of Wisconsin
My commission is permanent